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Robert L. Spurrier Jr.

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FEDERAL CONSTITUTIONAL RIGHTS: PRICELESS OR WORTHLESS? AWARDS OF MONEY DAMAGES UNDER SECTION 1983*

Robert L. Spurrier, Jr.**

Victims of constitutional rights violations are authorized by Congress in 42 U.S.C. § 1983 to seek damages from the offender. Professor Spurrier contends, however, that the Supreme Court has thwarted the effectiveness of Section 1983 by limiting the scope of possible defendants and the amount of damages that can be recovered. Professor Spurrier offers suggestions to ameliorate Section 1983 as a remedy for constitutional wrongs.

I. INTRODUCTION

Most students of American public law are prone to refer to the

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** Professor of Political Science and Associate Director of Arts and Sciences Extension, Oklahoma State University; A.B., A.M., University of Missouri; Ph.D., University of California, Santa Barbara.

rights of the individual which have been enshrined in the Constitution in terms bordering on reverence. It is not unusual to hear these rights described as priceless. Supreme Court opinions which span two centuries suggest that the federal judiciary is seriously interested in guarding the rights of the individual. Chief Justice John Marshall revered individual rights in *Marbury v. Madison*[1] when he stated: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[2] The importance of individual rights had not diminished almost two hundred years later when Justice William Brennan remarked in *Owen v. City of Independence, Missouri*[3] that "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . . ."[4]

Congress provided a vehicle to safeguard these rights in 42 U.S.C. § 1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[5]

The statute traces its ancestry to the Ku Klux Act of 1871.[6] Although enacted to protect the newly-freed blacks from lawless activities of whites in the southern states,[7] the statute prohibits the deprivation of *any* federal right, privilege or immunity held by *any* person. Thus the broad language of Section 1983 offers potential as a powerful tool to protect and preserve constitutional rights.

This article examines the extent to which the Supreme Court has interpreted Section 1983 in a manner consistent with the high aspira-

1. 5 U.S. 137 (1 Cranch) (1803).
2. *Id.* at 163.
3. 445 U.S. 622 (1980).
4. *Id.* at 651.
5. 42 U.S.C. § 1983 (1982).
6. Ku Klux Act of 1871 § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1982)).
7. *See* 1 B. SCHWARTZ, CIVIL RIGHTS 591-93 (1970); *see generally* S. REP. No. 1, 42d Cong., 1st Sess. (1871) (Senate debates on the Ku Klux Act); H.R. REP. No. 1, 42d Cong., 1st Sess. (1871) (House debates on the Ku Klux Act).

tions expressed in *Marbury* and *Owen*. Concluding that the Court has construed the remedial language in a way which renders these rights worthless, suggestions are offered to transform Section 1983 into a meaningful remedy that protects priceless constitutional rights.

II. Suits Against Individual Officers of a State or Municipality

A. *Rebirth of Section 1983*

Although Section 1983 was enacted in 1871, it was generally ineffective in securing redress for rights violations[8] until 1961 when the Supreme Court decision of *Monroe v. Pape*[9] brought the remedy into view. The Court expanded the reach of Section 1983 in two ways. The term "under color of" law was interpreted broadly to include actions taken under pretense of law instead of an extremely narrow view which would have limited the scope of the statute to acts affirmatively sanctioned by the law of the state.[10] Relying on a previous interpretation of parallel language in the federal criminal statutes, the Court concluded that Section 1983 extends to state officials misusing their official position.[11] The Court also held that the existence of state law remedies for rights violations did not preclude a federal civil suit for damages under Section 1983.[12] The promise of *Monroe* as an effective federal civil remedy[13] thus serves as a backdrop for discussion of subsequent Supreme Court opinions that construe and apply Section 1983.

B. *Under Color of State Law*

A limited number of cases calling for further interpretation of the "under color of" language in Section 1983 have come to the Supreme Court since the *Monroe* decision. In *Dennis v. Sparks*,[14] the Court was faced with a claim against a state judge and others who allegedly con-

8. *See, e.g.*, Egan v. City of Aurora, 275 F.2d 377 (7th Cir. 1960), *modified*, 365 U.S. 514 (1961); Simmons v. Whitaker, 252 F.2d 224 (5th Cir. 1958); Agnew v. City of Compton, 239 F.2d 226 (9th Cir. 1956), *cert. denied*, 353 U.S. 959 (1957).

9. 365 U.S. 167 (1961).

10. The plaintiff alleged in part that Chicago police officers broke into his home without a search warrant, destroyed personal property, arrested him without an arrest warrant, and subsequently denied him access to an attorney. The defendants argued that such conduct could not be considered "under color of law" because it would have violated Illinois law. *Id.* at 172.

11. *Id.*

12. *Id.* at 183.

13. *See The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 213 (1961).

14. 449 U.S. 24 (1980).

spired to deprive the plaintiff of federally secured rights through the issuance of a state court injunction.[15] The federal district court had ruled that the state judge was immune from Section 1983 suit, and the case against the other defendants was dismissed because they were not public officials acting under color of state law.[16] The district court's holding that private citizens could not exercise state authority by allegedly bribing a state judge was reversed by the Court of Appeals for the Fifth Circuit.[17] In affirming the circuit court's decision, the Supreme Court stated:

> Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge. But here the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability. Immunity does not change the character of the judge's action or that of his co-conspirators.[18]

Thus private parties who act in concert with a state official using state authority to commit a constitutional rights violation may not escape the consequences of their actions simply by claiming absence of state authority in their own right. Liability is imposed upon the private parties even if the state official is completely immune from liability by virtue of an official position.

While *Dennis* expanded the scope of Section 1983, the Court has not allowed the remedy in all instances. The Court held that the defendant had not acted under color of law in *Polk County v. Dodson*.[19] A criminal defendant brought a Section 1983 action against a public defender who had represented the defendant in a state criminal appeal. The Supreme Court concluded that a public defender does not act under color of state law when performing traditional legal services for a defendant in a criminal proceeding, even though the public defender is a full-time public employee of the county.[20] The Court noted that a

15. The injunction prohibited the production of oil on leases owned by Sparks. After a state appellate court dissolved the injunction, Sparks filed a Section 1983 action claiming that the lost production was a deprivation of property without due process of law. *Id.* at 25-26.

16. *Id.* at 26. The defendants named in the suit were Duval County Ranch Company, its sole owner, and two individual sureties on the injunction bond.

17. Sparks v. Duval County Ranch Co., 604 F.2d 976, 983 (5th Cir. 1979), *aff'd*, 449 U.S. 24 (1980).

18. 449 U.S. at 28.

19. 454 U.S. 312 (1981).

20. *Id.* at 325.

public defender is like any other lawyer in terms of the lawyer-client relationship.[21] Mere employment by the state was insufficient to establish that the public defender should be subject to Section 1983 liability.[22]

The *Dodson* court distinguished *O'Connor v. Donaldson*[23] and *Estelle v. Gamble*,[24] two cases involving state-employed prison physicians who were sued under Section 1983 concerning treatment of persons in state custody. In both cases, the majority concluded that the defendants were engaged in administrative duties as well as in the physician-patient relationship.[25] These additional responsibilities precluded a duty of undivided loyalty to the patient.[26] The public defender, who is obligated to defend the client and to enter into an adversary relationship against the prosecution in the context of the American criminal justice system, simply is not in the same situation.

C. *Relationship of Section 1983 to State Remedies*

Monroe pointed toward an exception to the general rule that state administrative remedies must be exhausted before the federal court will entertain a Section 1983 claim.[27] The Court articulated this exception in *Patsy v. Board of Regents*,[28] a case involving an employment discrimination claim. The Court's decision to permit a Section 1983 claim prior to exhaustion of state administrative remedies was based on cases which stressed the independent nature of the federal remedy[29] and the

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21. The defendant's obligations as a lawyer were unrelated to state authority:

> From the moment of her appointment, [the Section 1983 defendant] became Dodson's lawyer, and Dodson became [her] client. Except for the source of payment, their relationship became identical to that existing between any other lawyer and client. "Once a lawyer has undertaken the representation of the accused, the duties and obligations are the same whether the lawyer is privately retained, appointed or serving in a legal aid or defender program."

Id. at 318 (quoting STANDARDS FOR CRIMINAL JUSTICE § 4-3.9 (1980).

The Court also rejected arguments that the employment status of the public defender made her materially different from other attorneys. The Court did note, however, that a public defender could properly be sued under Section 1983 for acting under color of law in areas unrelated to the lawyer-client relationship. *Id.* at 324-25 (citing Branti v. Finkel, 445 U.S. 507 (1980)).

22. 454 U.S. at 319.

23. 422 U.S. 563 (1975).

24. 429 U.S. 97 (1976).

25. 454 U.S. at 320.

26. *Id.*

27. As no state administrative remedy existed, the *Monroe* Court only resolved the question of whether a plaintiff must exhaust state judicial remedies.

28. 457 U.S. 496 (1982).

29. *See id.* at 500-01.

legislative history of Section 1983.[30] It was also noted that when Congress imposed limited administrative exhaustion restrictions for prisoner-initiated Section 1983 actions,[31] it did not go further to impose general rules for exhaustion of state administrative remedies prior to the filing of a federal civil rights remedies case.[32] Congress therefore had made a policy decision not to impose an administrative remedies exhaustion rule in other types of Section 1983 cases.[33] The Court declined to judicially alter the rule in the face of congressional action.[34] If such a rule to require exhaustion of administrative remedies is forthcoming, it will be through the legislative and not the judicial process.

Notwithstanding the *Monroe* and *Patsy* decisions, state law can have an impact on the conduct of Section 1983 litigation. A provision of 42 U.S.C. § 1988 requires reference to state laws in certain circumstances if federal statutes are not precisely adapted to providing a remedy.[35] Recent decisions of the Supreme Court have applied a state survivorship statute to defeat a Section 1983 claim in *Robertson v. Wegmann*,[36] a state statute of limitations and state rules for the tolling of that statute to defeat a claim in *Board of Regents v. Tomanio*,[37] and a Puerto Rico statute of limitations to keep a claim alive in *Chardon v. Soto*.[38] Reference to state law was necessary in these instances because

30. *See id.* at 502-07.

31. The limitation states:

> [I]n any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

42 U.S.C. § 1997e(a)(1) (1982).

32. 457 U.S. at 509.

33. *Id.* at 510-12.

34. *Id.* at 512.

35. The statute provides in relevant part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States and their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C. § 1988 (1982).

36. 436 U.S. 584 (1978).

37. 446 U.S. 478 (1980).

38. 103 S. Ct. 2611 (1983).

the federal statutory law did not deal with the points in question. However, it should be understood that these decisions were based on Section 1988 and do not indicate a judicial retreat from the principles set forth in *Monroe* and *Patsy*.

D. *Doctrine of Collateral Estoppel*

The application of the doctrine of collateral estoppel[39] to Section 1983 claims was first addressed by the Court in *Allen v. McCurry*.[40] The Court concluded that a Section 1983 action against police officers for an alleged unconstitutional search and seizure could not be entertained by the federal district court when the state trial court had denied a motion to suppress evidence on fourth and fourteenth amendment grounds during a preliminary hearing.[41] The defendant's appeal to the state appellate court had been unsuccessful,[42] and the Supreme Court's decision in *Stone v. Powell*[43] prevented consideration of a habeas corpus proceeding by a federal district court.[44] Writing for the majority, Justice Stewart concluded that the collateral estoppel defense was available to the police officers who were named as defendants in the Section 1983 action, and that the unavailability of a habeas corpus remedy did not preclude the defense.[45] Thus the doctrine of collateral estoppel may be invoked in Section 1983 cases if a state court has made a determination concerning an alleged constitutional wrong, the determination was adverse to the claim of the plaintiff in the subsequent Section 1983 action, and a full opportunity was available to litigate the issue.

A strong dissent was written by Justice Blackmun in *Allen*. Joined by Justices Brennan and Marshall, he argued that the approach adopted by the majority undermined the rationale of Section 1983 as

39. Collateral estoppel or issue preclusion is a doctrine of efficiency. Once an issue of fact or law is actually litigated in a court of competent jurisdiction and the determination was essential to the judgment, the determination is binding on the parties in a subsequent proceeding. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4416 (1981).

40. 449 U.S. 90 (1980). The Court's most recent treatment of collateral estoppel in a Section 1983 case is Migra v. Warren City School Dist., 104 S. Ct. 892 (1984). *Migra* is discussed *infra* notes 162-69 and accompanying text.

41. 449 U.S. at 104.

42. *See* State v. McCurry, 587 S.W.2d 337 (Mo. Ct. App. 1979), *aff'd*, 449 U.S. 90 (1980).

43. 428 U.S. 465 (1976).

44. 449 U.S. at 91.

45. *Id.* at 105. For an analysis of the interplay of class action suits and damage actions, see Bodensteiner, *Application of Preclusion Principles to Section 1983 Damage Actions After a Successful Class Action for Equitable Relief*, 16 CLEARINGHOUSE REV. 977 (1983).

interpreted in *Monroe* because the state court determination was made binding on the federal judiciary.[46] The minority also urged that the rationale for the Section 1983 remedy is completely different from that of the exclusionary rule.[47] Because the exclusionary rule was the basis for the state courts' rulings,[48] and for the decision in *Stone v. Powell*,[49] the dissenters argued that the separate federal court remedy in a suit for money damages against the police officers under Section 1983 was proper.[50]

E. *Every Person*

Although *Monroe* was the fountainhead for the increase in civil rights damages suits in the past two decades, the Court did not consider the scope of possible defendants under Section 1983. Subsequent Supreme Court decisions have refused to extend liability to all persons involved in the rights violations. These decisions effectively limit the utility of the remedy by eliminating a source for recovery of money damages. Even though the statutory wording purports to render liable "every person" who violates federal rights under color of state law,[51] the Supreme Court has been unwilling to give full force to those words. Instead the Court has adhered to common law immunities which place certain governmental officials completely beyond the reach of the Section 1983 remedy.

The Court in *Tenney v. Brandhove*[52] held that state legislators were immune from suit under Section 1983 when the challenged action was a part of their legislative duties.[53] In *Pierson v. Ray*,[54] the Court granted immunity to state court judges acting within their judicial capacity.[55] Eleven years later the Supreme Court reaffirmed its commitment to total immunity for state judges in *Stump v. Sparkman*.[56] The defendant judge in *Stump* had ordered the sterilization of a fifteen year

46. 449 U.S. at 110.
47. *Id.* at 106.
48. *See* State v. McCurry, 587 S.W.2d 337, 341 (Mo. Ct. App. 1979), *aff'd*, 449 U.S. 90 (1980).
49. 428 U.S. at 494-95.
50. 449 U.S. at 114.
51. *See supra* note 5 and accompanying text.
52. 341 U.S. 367 (1951).
53. *Id.* at 378-79.
54. 386 U.S. 547 (1967).
55. *Id.* at 553.
56. 435 U.S. 349 (1978).

old girl at the request of her mother.[57] When the plaintiff learned of the true nature of the surgery two years later, she filed suit against the judge.[58] The Court refused to narrow the concept of judicial immunity in Section 1983 actions and held that the judge was immune from damages liability.[59] In a strident dissent, three justices argued that "what Judge Stump did . . . was beyond the pale of anything that could sensibly be called a judicial act."[60]

Even when a judge is involved in criminal conduct on the bench, the immunity defense is available to defeat a Section 1983 action for money damages. In *Dennis v. Sparks*,[61] the Supreme Court noted that judicial immunity for civil liability is complete even when the allegations include criminal conspiracy on the part of the judge.[62] Therefore, as long as a judicial act is within the jurisdiction of the court, no damages remedy exists under Section 1983 against the culpable state court judge.[63]

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57. The mother alleged in her petition that the daughter was retarded and sexually active. Thus sterilization was necessary to prevent "unfortunate circumstances." *Id.* at 351.

58. The plaintiff also named her mother, the mother's attorney, the doctors who performed the operation, and the hospital. *Id.* at 353.

59. *Id.* at 364. The *Stump* decision has been severely criticized. See Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237 (1978): Rosenberg, Stump v. Sparkman: *The Doctrine of Judicial Impunity*, 64 VA. L. REV. 833 (1978).

For a proposal limiting liability for judicial misconduct written in response to the *Stump* decision, see Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549 (1978). This article recounts a number of examples of judicial misconduct which are both shocking and beyond the scope of compensatory relief. The author proposes that the absolute immunity from liability in damages now available to judges should be shifted to a qualified good faith immunity similar to that available to executive officials. It is suggested that such a change will have to come through legislative action. The author proposes the use of a judicial discipline commission as the finder of fact in such suits.

Even with the broad scope of judicial immunity sanctioned by the court in *Stump*, limits on judicial power do exist. *See, e.g., Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978). The Court of Appeals upheld an award of $80,000 in compensatory damages and $60,000 in punitive damages against a judge who ordered a coffee vendor brought before him in handcuffs when he was annoyed with the taste of a cup of coffee. The judge also verbally threatened the vendor with additional retribution. *Id.* at 53-54.

60. 435 U.S. at 365.

61. 449 U.S. 24 (1980).

62. *Id.* at 31.

63. In a surprising departure from its previously unbroken line of decisions protecting judges from suits under Section 1983, the Supreme Court recently concluded that state court judges could be required to pay the attorneys' fees of successful Section 1983 plaintiffs who obtained federal injunctive relief against judicial actions which constituted federal rights violations. In Pulliam v. Allen, 104 S. Ct. 1970 (1984), a five-member majority found that the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988 (1982) was intended to provide awards of attorneys' fees to successful civil rights plaintiffs even if the defendants are immune from awards of money damages. 104 S. Ct. at 1982.

The *Pulliam* decision is also important in that it recognizes for the first time the possibility of relief under Section 1983 against judges acting in their official capacity. While the absolute bar-

The common law immunity preserved for judges in Section 1983 disputes was extended to state prosecutors in *Imbler v. Pachtman*.[64] The Section 1983 plaintiff alleged that a California deputy district attorney knowingly used false testimony and suppressed material evidence in a criminal case.[65] Such deliberate perversions of the adversary process would clearly constitute a denial of due process of law under the fourteenth amendment as interpreted in *Napue v. Illinois*[66] and *Brady v. Maryland*.[67] Still, the Court opted for preservation of absolute immunity of prosecutors from civil suits for actions taken within their traditional duties.[68] Justice Powell reasoned that potential civil liability could deflect the prosecutor's energy away from his public duties and make him timid in the execution of those duties.[69] The Court also expressed concern that fear of civil liability might lead a prosecutor to be overly cautious in presenting evidence to the jury.[70] While the federal criminal law analog to Section 1983[71] serves as a deterrent to such conduct, this statute provides no compensation to the victim.

The problem of perjured testimony arose again in *Briscoe v. LaHue*.[72] Following a conviction in a state criminal case, the defendant filed a civil suit against police officers who were alleged to have given

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rier against suits for money damages remains in place, the holdings in *Pulliam* have made it more likely that judges will find themselves appearing as defendants in future Section 1983 actions.

64. 424 U.S. 409 (1976).

65. *Id.* at 414.

66. 360 U.S. 264 (1959). The prosecutor in *Napue* promised the defendant's accomplice that he would recommend a reduced sentence in exchange for the accomplice's testimony against the defendant. The accomplice denied any such arrangement during the defendant's trial and the prosecutor failed to correct the false testimony. *Id.* at 265.

67. 373 U.S. 83 (1963). Defense counsel in *Brady* requested statements made by the defendant's accomplice. Although several statements were provided, the prosecutor withheld a statement in which the accomplice admitted the homicide. *Id.* at 84.

68. 424 U.S. at 430. The Court reserved the question of whether the immunity extended to administrative and investigative duties. *Id.* at 430-31.

69. *Id.* at 425-26.

70. *Id.* at 426.

71. The criminal statute worded similarly to Section 1983 states:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 242 (1982).

72. 103 S. Ct. 1108 (1983).

perjured testimony which led to the criminal conviction.[73] The Court continued to find exceptions to the "every person" language of Section 1983 and refused to impose liability against the officers.[74] The majority opinion began with a treatment of private witnesses' status in criminal trials, asserting that their testimony did not give them under color of law status, and that Anglo-American legal history provided immunity from civil suit for persons who had served as witnesses in criminal cases.[75] Turning to the testimony of police officers in criminal trials, the Court then traced the history of the immunity cases surrounding the judicial process.[76] Both perspectives led to the conclusion that police officers are immune from civil liability for the testimony they give in criminal cases, even if that testimony is perjured.[77]

While a public defender performing the normal duties of defense counsel does not act under color of law,[78] an allegation of conspiracy involving a public defender and other state officials is sufficient to state a cause of action under Section 1983. Speaking for a unanimous Supreme Court in *Tower v. Glover*,[79] Justice O'Connor concluded that there is no exception to the statutory remedy when the defendant is a public defender alleged to have intentionally violated the plaintiff's federal rights.[80] While noting that several exceptions to Section 1983 liability had been recognized in the past, the Court found nothing in the common law background of the statute to justify an additional exception for public defenders whose intentional actions led to constitutional rights deprivations.

The office of public defender did not exist in 1871 when the predecessor of Section 1983 was enacted by Congress; however, English barristers in the nineteenth century, like public defenders, could not choose their own clients.[81] The Court decided to follow the English approach to barrister liability which granted immunity for negligent conduct but not intentional misconduct.[82] In the few state court decisions involving public defender liability, Justice O'Connor found none

73. *Id.* at 1111.
74. *Id.* at 1121.
75. *Id.* at 1113-15.
76. *Id.* at 1115-16.
77. *Id.* at 1118.
78. *See* Polk County v. Dodson, 454 U.S. 312, 325 (1981). *Dodson* is discussed *supra* notes 19-26 and accompanying text.
79. 104 S. Ct. 2820 (1984).
80. *Id.* at 2826.
81. *Id.* at 2825.
82. *Id.*

that allowed the immunity defense when the action was intentional.[83] Thus nothing in the legislative history of Section 1983 or its English or American corollaries supported the exemption claimed by the public defenders.

The defendants also asserted that public defenders, like prosecutors, have resonsibilities to the judicial system which may be seriously impaired by the threat of frivolous lawsuits.[84] It was argued that these lawsuits could lead to an inability of the state to meet the constitutional requirement of providing defense counsel to indigent criminal defendants. The Court responded that any relief should come from Congress and not the judiciary.[85]

It is apparent that the Court is willing to provide the full scope of the Section 1983 remedy in the case of intentional misconduct by public defenders. When the Section 1983 claims are groundless, federal district court judges should render summary judgment for the defendants so as not to subject the public defender to harassment by disgruntled state prisoners who may be prone to litigate meritless claims. If *Tower* leads to a flood of prisoner-initiated suits, one can anticipate calls for relief from the public defenders to the courts or Congress.

The Supreme Court's interpretation of "every person" thus contains major exceptions to the literal wording of Section 1983. State legislators acting within the traditional scope of their legislative duties, and state court judges acting within the broadest scope of their jurisdiction possess absolute immunity from suit for money damages under the statute. Similarly, freedom from Section 1983 liability extends to prosecutors, insofar as their discretionary decisions in prosecuting a criminal defendant, and police officers when the alleged constitutional wrong is based on testimony given in a criminal trial. No matter how flagrantly the victim's rights have been violated, these state officials can

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83. *Id.* at 2826 & n.5.

84. *Id.* at 2826.

85. The Court stated:

> Petitioners' concerns may be well founded, but the remedy petitioners urge is not for us to adopt. We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate.

Id.

The majority suggested in dictum that the abstention doctrine might provide relief when a plaintiff had already advanced the claim in a previous state court proceeding. *Id.* In a concurring opinion, Justices Brennan, Marshall, Blackmun, and Stevens indicated that this issue was not properly before the Court and therefore should not be addressed. *Id.* at 2827.

rest assured that a Section 1983 action for money damages against them cannot prevail. For the person who has sustained the constitutional wrong, there is no constitutional remedy to recover money damages from these types of offending officials under Section 1983, even though the offenders have unquestionably acted under color of state law.

F. *Qualified Good Faith Immunity Defense*

While legislators, judges, prosecutors and witnesses enjoy complete immunity from suit, immunity for police officers and other individuals has been less generously received by the Supreme Court in Section 1983 suits seeking money damages. The Court in *Pierson v. Ray*[86] concluded that police officers were not charged with the duty of predicting the future course of constitutional interpretation and were therefore entitled to a good faith immunity defense in a suit based on the officer's enforcement of an unconstitutional statute.[87] Subsequent decisions in *Scheuer v. Rhodes*[88] and *Wood v. Strickland*[89] reduced the strength of the good faith defense as outlined in *Pierson* and opened a greater opportunity for recovery by a plaintiff seeking damages for a constitutional wrong.

Scheuer and *Wood* resulted in the development of a qualified good faith immunity defense based on a reasonable belief held by the officials at the time of the alleged constitutional violation. The *Wood* opinion formulated the test as follows:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability . . . if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[90]

Under this test, ignorance of the Constitution will not be adequate as a defense against a civil suit filed under Section 1983 in all circumstances. However, the actual good faith of the official is not the only consideration. Other important factors are the extent of the knowledge of constitutional rights which the court determines that the officer pos-

86. 386 U.S. 547 (1967).
87. *Id.* at 557.
88. 416 U.S. 232 (1974).
89. 420 U.S. 308 (1975).
90. *Id.* at 322.

sessed or should have possessed at the time of the constitutional wrong, and whether the actions of the official were based on a reasonable assessment of the circumstances. At least in the case of obvious wrongs, a recovery for damages is possible even if the officer actually believed that his action was correct at the time. Recovery is warranted as long as the court can conclude that the belief was not reasonable in light of the situation, or not justified in view of what the officer should have known about the rights guaranteed by the Constitution.

The Supreme Court's belief that the qualified good faith immunity defense is an appropriate way to balance the competing interests of plaintiffs and defendants is also seen in *Harlow v. Fitzgerald*.[91] While this case was not a Section 1983 action,[92] it used the case law developed under Section 1983 as the norm for executive officer liability in cases alleging constitutional rights deprivations. Noting that the qualified good faith immunity approach had been adopted for federal officials in *Butz v. Economou*,[93] the Court concluded that the approach is the preferred manner of reconciling the interests of litigants in civil rights cases.[94] In a companion case to *Harlow*, the Court held in *Nixon v. Fitzgerald*[95] that the President of the United States is completely immune from civil suits seeking damages for constitutional wrongs he may have committed.[96] The majority concluded that the President, unlike governors and other state officials in the executive branch, may not be sued for constitutional rights violations under any circumstances.[97] Although the *Nixon* case does not have a direct bearing on Section 1983 actions,[98] it does create an additional exception to the opportunities for individuals to collect money damages against government officials who commit constitutional wrongs.

91. 457 U.S. 800 (1982).

92. Plaintiff alleged that a right to damages for wrongful discharge could be inferred by two federal statutes which protected governmental employees who furnished information to members of Congress. *Id.* at 805 & n.10.

93. 438 U.S. 478 (1978).

94. The public officials' interests include the adverse impact upon the operation of the government office and the costs of litigating subjective intent. 457 U.S. at 816-17.

95. 457 U.S. 731 (1982).

96. *Id.* at 749. Fitzgerald claimed that he was dismissed from his job as an Air Force management analyst in retaliation for congressional subcommittee testimony that was adverse to the Department of Defense. President Richard Nixon allegedly participated in a conspiracy to discharge Fitzgerald. *Id.* at 740 & n.19.

97. *Id.* at 749-50.

98. *See supra* note 92 and accompanying text.

G. *Conduct Which Imposes Liability*

Assuming that the qualified good faith immunity standard is the appropriate one to apply in claims against state executive-branch officials acting under color of law, the question arises as to the level of culpability necessary to negate the qualified good faith defense.[99] This is an issue which has confronted the Supreme Court in three separate cases without satisfactory resolution.

In *Procunier v. Navarette*,[100] the Court granted certiorari to resolve the negligence question but concluded that no "clearly established" constitutional right had been violated by the defendant state prison officials.[101] Because the officials could not reasonably have been expected to anticipate future developments in the constitutional rights of prisoners, they were entitled to use the qualified good faith immunity defense.[102] By deciding the case on a lack of clearly established rights, the Court found it unnecessary to deal with the negligence question.[103]

The Court tried to reach the issue in *Baker v. McCollan*,[104] but was unsuccessful because it again found that no constitutional rights violation had occurred.[105] In reaching this conclusion, Justice Rehnquist noted that the negligence issue may be more complex than it first appears:

> Having been around this track once before in *Procunier* . . . we have come to the conclusion that the question of whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action. In any event, before the relationship between the defendant's state of mind and his liability under § 1983 can be meaningfully explored, it is necessary to isolate the precise constitutional violation with which he is charged. . . . If there has been no such deprivation, the state of mind of the defendant is wholly immaterial.[106]

99. Section 1983 is silent as to the mental state required to commit a deprivation of civil rights. *See supra* note 5 (current text of Section 1983).
100. 434 U.S. 555 (1978).
101. *Id.* at 564.
102. The plaintiff, an inmate of a state prison, alleged that prison officials refused to mail his letters during 1971-72. Prisoner mailing privileges were not recognized as a first amendment right until 1974. *Id.* at 563-65.
103. *Id.* at 566 n.14.
104. 443 U.S. 137 (1979).
105. *Id.* at 146-47.
106. *Id.* at 139-40.

Of course it is arguable that this discussion of a variable standard of liability in different situations is only dictum because the Court concluded that no rights violation had been committed.

Recognizing the frustration of attorneys and lower court judges confronted with the opinions of *Procunier* and *Baker*, Justice Rehnquist attempted to address the issue in *Parratt v. Taylor*.[107] In what appeared to be a prisoner's attempt to turn the federal district court into a small claims court, the plaintiff sought to recover $23.50 for hobby supplies lost by prison officials.[108] The prisoner alleged that the loss was a deprivation of property without due process of law.[109] Justice Rehnquist noted that the lower courts had adopted varying standards as to negligence-based Section 1983 liability without much help from the Supreme Court, and then proceeded to consider the language and history of the statute:

> Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In *Baker v. McCollan* . . . we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under § 1983. . . . Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement. . . .
>
> Both *Baker v. McCollan* and *Monroe v. Pape* suggest that § 1983 affords a "civil remedy" for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.[110]

The negligence question was bypassed again because the Court concluded that property loss which may have been caused by negligence on the part of the prison officials was not a violation of the plaintiff's fourteenth amendment due process rights.[111]

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107. 451 U.S. 527 (1981).

108. *Id.* at 529. The federal district court possessed subject matter jurisdiction because the statute which authorizes the federal district courts to hear damage claims for deprivation of civil rights does not have a minimum dollar amount. *See* 28 U.S.C. § 1343 (1982).

109. 451 U.S. at 530.

110. *Id.* at 534-35.

111. The Court found that the deprivation was not a result of an established state procedure, but occurred because the officials failed to follow the established procedure. *Id.* at 543. For a

Thus the negligence discussion again would appear susceptible to classification as dictum given the failure of the plaintiff to cross the constitutional wrong threshold specifically required for a successful Section 1983 action. Although the Court has not yet specifically ruled on the standard necessary to impose Section 1983 liability, these three decisions indicate that a negligence standard may at least be permissible in some circumstances, and that Section 1983 should not be interpreted to contain the strict requirement of intentional infliction of harm before liability may be imposed for violation of constitutional rights.

III. Measure of Damages in Section 1983 Suits

A plaintiff who can prove a violation of his or her constitutional rights and avoid the immunities discussed above is entitled to an award of damages under Section 1983. The question then becomes one of assessing the measure of damages which may be awarded in Section 1983 suits. Two relatively recent decisions of the Supreme Court shed light on this matter. In *Carey v. Piphus*,[112] students who had been suspended from school claimed a denial of procedural due process guaranteed by the fourteenth amendment.[113] When the trial court found a constitutional wrong but refused to award money damages, the successful Section 1983 plaintiffs appealed. The Seventh Circuit disagreed with the district court's disposition of the damages question and held that the plaintiffs were entitled to recover substantial nonpunitive damages without proof of any actual injury other than deprivation of their federal due process rights.[114] The Supreme Court granted certiorari to consider the appropriate measure of damages in Section 1983 cases.

In a decision without a recorded dissent,[115] the Court held that the students were entitled to recover only nominal damages in the absence of proof of actual injury.[116] The Court rejected the plaintiffs' assertion that damages should be awarded simply because constitutional rights had been violated.[117] The Court also disagreed with the claim that every deprivation of procedural due process should lead to a presump-

critique of the *Parratt* decision, see Friedman, Parratt v. Taylor: *Opening and Closing the Door on Section 1983*, 9 Hastings Const. L.Q. 545 (1982).

112. 435 U.S. 247 (1978).

113. *Id.* at 250.

114. *See* Piphus v. Carey, 545 F.2d 30, 32 (7th Cir. 1976), *rev'd*, 435 U.S. 247 (1978).

115. Justice Marshall concurred in the result without filing an opinion. Justice Blackmun did not participate in the decision.

116. 435 U.S. at 266.

117. *Id.* at 264.

tion of some injury which would relieve the plaintiff from proving actual injury.[118] Looking to the records surrounding congressional enactment of Section 1983, the Court found no indication of an intent to create an additional element beyond that inherent in any award of compensatory damages.[119] The Court also was unwilling to accept the plaintiffs' contention that damages should automatically flow from every deprivation of procedural due process:

> [A]lthough mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.[120]

Immediately following this passage, the Court stated that it was not imposing a blanket rule for all constitutional rights violations and noted that each type of violation calls for an independent judgment.[121] This section of the Court's opinion is particularly important because it should effectively head off attempts to cite *Carey* as a flat rejection of the concept of presumed damages in all constitutional rights situations.

The Court was still faced with the fact that the plaintiffs in the case actually had suffered a constitutional rights deprivation. For this reason, it was necessary to apply the traditional common law custom of permitting nominal damages in order to insure that rights of this type are scrupulously observed. Nominal damages are awarded without requiring proof of actual injury, but the amount is token in nature.[122] Applying this standard, the Court concluded that the deprivation of procedural due process rights was actionable per se to the extent that nominal damages would be recoverable without proof of injury in an amount not to exceed one dollar.[123]

The *Carey* decision raises grave questions about the seriousness of the Court in effectuating the compensatory rationale contained in Section 1983. As a practical matter, the Court has relegated the value of constitutional rights per se to the bargain basement. An award of only nominal damages, no matter how it is justified in terms of common law heritage from other settings, is a judicial pronouncement that constitu-

118. *Id.* at 262.
119. *Id.* at 256-57.
120. *Id.* at 264.
121. *Id.* at 265. The Court analogized to the common law rules of damages that are defined by the particular interest to be protected. *Id.* at 257-59.
122. *See* RESTATEMENT OF TORTS § 907 (1939).
123. 435 U.S. at 267.

tional rights are nearly worthless. To achieve a substantial award of damages, the successful plaintiff must prove injury above and beyond the actual constitutional wrong. Language in the *Carey* opinion indicating that awards for mental anguish may be made under Section 1983 when proof of such actual injury is forthcoming does nothing to disguise the fact that the constitutional rights deprivation per se is going uncompensated. At least in the setting of procedural due process violations surrounding school suspensions, the Supreme Court has failed to give the victim of a constitutional wrong a meaningful remedy for the violation of his or her most fundamental legal rights.[124]

Smith v. Wade[125] marks a more positive development for plaintiffs in the context of Section 1983 litigation. A state reformatory inmate brought suit against prison guards and won a judgment of $25,000 in compensatory damages and $5,000 in punitive damages.[126] The judgment was affirmed on appeal by the Eighth Circuit.[127] The only issue presented to the Supreme Court was the proper standard for imposition of punitive damages under Section 1983.

The Court indicated that the legislative history surrounding Section 1983 offered little guidance on the measure of damages.[128] Awards of punitive damages, however, have been a settled part of American law in both federal and state jurisdictions.[129] The Court also noted that while other cases had presumed the availability of punitive damages under Section 1983 in some circumstances, the matter never had come squarely before the Court.[130] Even the defendant in *Smith* did not deny that punitive damages might be appropriate in some situations; instead, he claimed they were not appropriate in the absence of the showing of "ill will, spite, or intent to injure."[131]

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124. Because *Carey* involved only procedural due process, it is possible to argue that it does not preclude awards of substantial damages for the deprivation of substantive constitutional rights per se. *See* Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981); Note, Herrera v. Valentine: *Presumed Damages for Violations of Substantive Constitutional Rights*, 28 S.D.L. REV. 221 (1982).

For an analysis suggesting that the Court misconstrued the doctrine of tort liability in the legislative intent of Section 1983 in the *Carey* decision, see Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242 (1979). *See also* Note, *Damage Awards for Constitutional Torts: A Reconsideration after* Carey v. Piphus, 93 HARV. L. REV. 966 (1980) (purpose of damage remedies is redress for the abridgement of constitutional rights).

125. 103 S. Ct. 1625 (1983).

126. *Id.* at 1628.

127. Wade v. Haynes, 663 F.2d 778 (8th Cir. 1981), *aff'd*, 103 S. Ct. 1625 (1983).

128. 103 S. Ct. at 1628.

129. *Id.* at 1629 & n.3.

130. *Id.* at 1629.

131. *Id.* at 1628-30.

The district court had instructed the jury that punitive damages might be awarded if the defendant's conduct was shown to be "a reckless or callous disregard of, or indifference to, the rights or safety of others . . . ."[132] Accepting the district court's approach, Justice Brennan concluded that a showing of actual intent to cause harm is not required under Section 1983 before an award of punitive damages is appropriate.[133] The jury instruction in question was found to be sufficiently clear to demonstrate that culpable conduct beyond ordinary negligence is required to justify an award of punitive damages. The Court found no risk of diminution of a deterrent effect simply because the standard used in the jury instructions did not provide a crystal clear definition of the level of culpability required.[134]

Following an additional discussion of the law of torts surrounding compensatory and punitive damage awards, the Court stated:

> We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. We further hold that this threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness.[135]

The last sentence in the Court's holding was necessary because the prison guard was protected from liability for mere negligent conduct as his duties required an exercise of discretion.[136] It should not be read to imply that recklessness is the minimal standard for compensatory damages in all circumstances, particularly in light of the Court's indications to the contrary in the negligence-standard cases discussed above.[137]

As a result of the line of cases beginning with *Monroe* and developing through *Smith*, it is apparent that the remedy of money damages provided by Congress in Section 1983 provides no realistic protection

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132. *Id.* at 1628 (emphasis omitted).

133. *Id.* at 1637.

134. The need for exceptional clarity in the standard for punitive damages arises only if one assumes that there are substantial numbers of officers who will not be deterred by compensatory damages; only such officers will seek to guide their conduct by the punitive damages standard. The presence of such officers constitutes a powerful argument *against* raising the threshold for punitive damages.

Id. (emphasis in original).

135. *Id.* at 1640.

136. Justice Brennan cited *Procunier* as the basis for Smith's qualified immunity status. *Id.* at 1639-40. A better reading of *Procunier* is that no "clearly established" constitutional right had been violated at the time the action took place. Thus the qualified good faith defense was sufficient to defeat the Section 1983 claim.

137. *See supra* notes 99-111 and accompanying text.

to the victim of constitutional rights deprivations. The immunities offered to certain state officials and the limitations on damage awards for constitutional wrongs per se emasculate Section 1983. Even when damages are awarded, the problem of the judgment-proof individual remains. Collection of the award may not be a realistic possibility due to an absence of resources with which to satisfy the judgment. For this reason, as well as the situations in which the individual officer is immune, another source of recovery is necessary.

IV. GOVERNMENTAL ENTITIES AS SECTION 1983 DEFENDANTS

Plaintiffs' attorneys in search of the proverbial deep pocket from which to extract an award of money damages naturally look past the often poorly paid state and local governmental employees to gaze fondly at the public purse as a source of payment for damages. *Monroe* held that a municipal government was not the proper defendant under Section 1983,[138] but the Court read the legislative history of the statute in 1978 to reach the opposite conclusion in *Monell v. Department of Social Services*.[139] The Court chose to impose liability against the municipal government when the rights violations were a matter of public policy or custom,[140] but it refused to hold a governmental defendant vicariously liable for the action of its individual officers under the doctrine of respondeat superior.[141] The decision to overrule *Monroe* thus opened the door of the federal courthouse to suits for money damages against the deep pocket of the governmental treasury, at least in the case of "public policy or custom" violations of federal rights.[142]

Monell revealed that the Court was unwilling to impose liability on the governmental units for every action of their employees. Rejection of the respondeat superior approach clearly indicated that most cases involving constitutional rights violations would not tap the public treasury for money damages. *Monell* left undecided the question of whether the governmental unit would be able to make use of the im-

138. 365 U.S. at 191.
139. 436 U.S. 658 (1978).
140. *Id.* at 694.
141. *Id.* at 663 n.7.
142. One commentator has asserted that Congress meant to impose a "duty of protection" of civil rights on municipal governments rather than simply providing for liability for official policy misfeasance. Note, *Municipal Liability under Section 1983: The Meaning of "Policy or Custom"*, 79 COLUM. L. REV. 304, 315 (1979). *Contra* Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935 (1979) (municipal entities should not be liable on respondeat superior grounds). For a thorough analysis of the implications of the *Monell* decision, see Schnapper, *Civil Rights After* Monell, 79 COLUM. L. REV. 213 (1979).

munity defenses available to its officers. The Supreme Court answered this question in *Owen v. City of Independence, Missouri*.[143]

The Court was faced with a situation in which the individual officer defendants who had dismissed a municipal employee without due process were able to assert a qualified good faith immunity defense; the governmental entity also claimed the qualified good faith immunity defense. On the facts of the case, there was no doubt that the dismissal constituted an action of city policy rather than an isolated act of a municipal employee.[144] The question left open in *Monell* now required an answer.

Beginning with the statutory language of Section 1983, Justice Brennan, writing for the majority, noted that there is no provision for immunity of any defendant in the precise wording of the law.[145] The judicially created exceptions for legislators, judges, and others were based on common law precedents and the reasons behind them.[146] The Court then refused to extend the qualified good faith defense to governmental entities.[147]

The majority opinion noted that suits against municipal corporations were common at the time Section 1983 was enacted, and apparently there was no general approach granting a good faith immunity to a municipality.[148] Justice Brennan also discounted separation of powers concerns in the state courts as inapplicable when a federal court was reviewing a policy decision already made and implemented by the governmental unit.[149] The Court then summarized the advantages of the decision:

> We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals

143. 445 U.S. 622 (1980).

144. Owen was acting as the Independence Chief of Police when allegations of improper handling of property in the police property room surfaced. In a regularly scheduled meeting, the City Council of Independence authorized the City Manager to take direct action against anyone who had been involved in the impropriety. Pursuant to this directive, the City Manager discharged Owen from his duties. *Id.* at 627-29.

145. *Id.* at 635.

146. *Id.* at 637-38.

147. The Court concluded that:

> [T]here is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.

Id. at 638.

148. *Id.* at 639-40.

149. *Id.* at 648.

> in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."[150]

Thus the five-justice majority in *Owen* attempted to allocate the burden of liability for constitutional rights violations among the victim, the officer and the governmental unit involved.

Once the Court had decided that governmental entities could be adjudged liable for compensatory damages, the next question to be determined was the appropriateness of assessing punitive damages in suits against governmental defendants. The issue was presented to the Court in *City of Newport v. Fact Concerts, Inc.* [151] Following a wrongful revocation of an entertainment license one day prior to a scheduled rock concert, the promoter subsequently filed a Section 1983 action against the City of Newport and its officials.[152] The jury returned substantial verdicts for both compensatory and punitive damages.[153] The awards were affirmed by the Court of Appeals for the First Circuit.[154]

In the analytical framework typical of Section 1983 decisions, the Court discussed the legislative history of Section 1983 and cases which had construed it.[155] The Court also reviewed the general tendency of courts throughout the United States to disallow punitive damages against municipalities.[156] Fearful that awards of punitive damages

150. *Id.* at 657.

151. 453 U.S. 247 (1981).

152. The license was revoked because the Newport City Council thought that the promoter had engaged a "rock" band to play at the concert. The city objected because it felt that the band would attract a boisterous audience. Plaintiff's complaint alleged that the license cancellation was a form of censorship. *Id.* at 250-52.

153. Compensatory damages totalled $72,910 and punitive damages totalled $275,000. *Id.* at 253.

154. Fact Concerts, Inc. v. City of Newport, 626 F.2d 1060 (1st Cir. 1980), *vacated*, 453 U.S. 247 (1981).

155. 453 U.S. at 263-66.

156. *Id.* at 259-63.

would threaten financial stability of local governments,[157] the Court refused to permit punitive damages against governmental entities in a Section 1983 case.[158]

The victim of a constitutional wrong now has a chance to recover damages from municipal corporations as long as the harm suffered can be characterized as the result of some official policy or custom embraced by the local government. While individual defendants may escape personal liability via the immunity defense, the municipal government cannot make use of that defense to protect the public treasury. Although the decisions of *Monell* and *Owen* mark a dramatic shift of Section 1983 interpretation, they do not offer a substantial means of redressing all constitutional wrongs. First these decisions deal only with public policy violations of federal rights.[159] Second a plaintiff who can prevail on the assertion that the constitutional wrong was a result of public policy or custom is only awarded nominal damages for constitutional rights deprivation per se.[160] An award of back pay or compensation for consequential harms will satisfy an injured plaintiff, but constitutional rights alone are worth no more than one dollar in Section 1983 compensation under some circumstances. Third municipal governments are not liable for punitive damages.[161] While punitive damages remain a distinct possibility against individual officials, the deep pocket of the public treasury cannot be tapped to recover such awards.

The most recent decision in the area of governmental liability under Section 1983 came in *Migra v. Warren City School District*.[162] The question facing the Court in *Migra* was whether a state court judgment in the plaintiff's civil suit concerning nonreappointment as a supervisor of elementary education was to be given preclusive effect in the context of a subsequent Section 1983 action brought in a federal

157. *Id.* at 270.

158. [C]onsiderations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials. Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of § 1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983.

Id. at 271.

159. *See Monell*, 436 U.S. at 694.

160. *See* Carey v. Piphus, 435 U.S. 247, 267 (1978).

161. *Fact Concerts*, 453 U.S. at 271.

162. 104 S. Ct. 892 (1984).

court.[163] Citing *Allen v. McCurry*,[164] the Court stated: "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered."[165] Although *Allen* involved issues that had been specifically litigated at the state court level,[166] the Court did not rule on the preclusive effect of issues which could have been raised in the state court litigation but were not included by the plaintiff.

The *Migra* Court concluded that no valid reason existed to treat the two situations differently, specifically rejecting the argument that a less restrictive application of the preclusion doctrine was intended by a Congress concerned with state courts' ability to protect federal rights.[167] Because the preclusion doctrine followed by the Court in *Migra* requires the federal courts to use the same rules which would be employed by the state courts,[168] the ultimate decision in the case was to remand it to the Ohio courts for a determination on whether state court rules would preclude the raising of issues which had not been initially raised.[169]

While suits against local governmental units seeking money damages are now possible under Section 1983, the same is not true when the plaintiff seeks compensation against state governmental agencies. Although the Court has held that the enforcement clause of the fourteenth amendment permits Congress to provide for suits against the states by appropriate legislation,[170] the majority has sought explicit

163. The plaintiff alleged two causes of action relating to her employment contract in the state court action but did not allege the Section 1983 claim. After the contract claims were resolved, the plaintiff filed a Section 1983 claim in the federal district court. The complaint alleged that her employment termination was intended to punish her for exercising first amendment rights. Additionally plaintiff claimed denial of due process and equal protection. *Id.* at 895.

164. 449 U.S. 90 (1980).

165. 104 S. Ct. at 896.

166. *See supra* note 41 and accompanying text.

167. 104 S. Ct. at 897.

168. *Id.* at 896.

169. *Id.* at 899.

170. In Fitzpatrick v. Bitzer, 427 U.S. 445 (1978), the Court stated:

> [W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section, Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

congressional language for permitting such litigation.[171] In the Section 1983 context, the issue then becomes whether Congress intended to provide for suits against state governments by private plaintiffs when the statute was adopted. In *Quern v. Jordan*,[172] the Court reached the conclusion that Section 1983 did not provide authority to override normal immunity of states provided by the language of the eleventh amendment, even when injunctive relief might be available against individual state officers to prevent future harms.[173]

V. IMPROVING THE SECTION 1983 REMEDY

In view of the Supreme Court decisions handed down in the last two decades, it seems appropriate to conclude that federal constitutional rights in many instances are worthless. The promises of Chief Justice John Marshall[174] and Justice William Brennan,[175] speaking for the Supreme Court of the United States, is a hollow one. It is apparent that ample room remains for improvement of the remedial system available to the victim of federal constitutional rights violations which take place at the hands of officials acting under color of law.

First, a guaranteed minimum recoverable amount in compensatory damages must be established to avoid the implication of the *Carey* decision that constitutional rights per se are worthless. If such a minimum is not implemented, the Supreme Court will have to fashion a

Id. at 456. *See also* Hutto v. Finney, 437 U.S. 678 (1978) (attorneys' fees can be assessed against a state under 42 U.S.C. § 1988).

171. *See* Edelman v. Jordan, 415 U.S. 651, 672 (1974).

172. 440 U.S. 332 (1979).

173. *Id.* at 345. The Quern majority cited Alabama v. Pugh, 438 U.S. 781 (1978) which held that a Section 1983 suit against the state and its board of corrections was barred by the eleventh amendment. States may be considered "persons" under Section 1983, but the eleventh amendment would bar suits in federal court because Congress did not clearly remove the Amendment's protection. The practical value of such an approach would be that plaintiffs could sue under Section 1983 in state courts where the eleventh amendment would not be applicable. *See* Note, *Amenability of States to Section 1983 Suits: Reexamining* Quern v. Jordan, 62 B.U.L. REV. 731, 776 (1982).

As the states are not amenable to suit under Section 1983, a court must inquire whether the defendant governmental entity is a "state" agency or a "local" one. In Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), the Court had to determine that the school board's authority under state law was local in nature. After reviewing the Ohio statutes, the Court concluded that "a local school board . . . is more like a county or city than it is like an arm of the State." *Id.* at 280. A similar issue was confronted by the Court in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). The Court found that a planning agency created by interstate compact was a proper Section 1983 defendant. *Id.* at 402. Obviously, it is in a plaintiff's interest to present arguments that point toward the local end of the state-local authority continuum in light of the Court's interpretation of Section 1983 in *Quern*.

174. *Supra* note 2 and accompanying text.

175. *Supra* note 4 and accompanying text.

jurisprudence of constitutional remedies by determining which rights are worthy of protection. The Court will be forced to decide whether the freedoms of religion or press receive the same treatment as that given procedural due process. The right to equal protection in matters of racial discrimination will be weighed and assigned a value. In essence, the Court will draw lines between those rights which are really compensable per se and those which are not.

In order to adequately compensate a victim of a constitutional rights deprivation and to protect governmental entities and employees from the threat of crushing damage awards, it would be appropriate for Congress to provide both a minimum recovery mandated by statute and also a maximum amount recoverable for the constitutional deprivation per se. As a starting point, it is suggested that a minimum award of $1,000 and a maximum award of $10,000 be established. Congress has provided for special arrangements in the types of awards, and the criminal law is replete with legislatively mandated minima and maxima when it comes to ranges of permissible sentences.[176]

Second, the absolute immunity defense available to prosecutors, judges, and legislators should be modified to provide only the qualified good faith immunity defense available to other state and local officials. As school board members and other state and local officials have managed to survive since *Monroe v. Pape*,[177] judges, legislators, and prosecutors could also withstand the added responsibility. Society's interest in having courageous and fearless legislators, judges, and prosecutors is an insufficient reason to grant complete immunity to these individuals in light of the experience of other officials since the *Monroe* decision

176. For example, Congress has provided that the victim of an illegal interception, disclosure, or use of wire or oral communication in violation of the federal criminal law shall be entitled to recover "actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher." 18 U.S.C. § 2520 (1982). Similarly, 12 U.S.C. § 1723a(e) (1982) provides for $100 per day in punitive damages for misuse of the words "Federal National Mortgage Association" or "Government National Mortgage Association" regardless of whether the plaintiff can obtain actual damages. Unjust conviction and imprisonment also gives rise to a civil damages award against the United States in a maximum amount of $5,000. *See* 28 U.S.C. § 2513(e) (1982).

Maximum fines exist in the criminal statutes also. For example, 18 U.S.C. § 241 (1982) sets a $10,000 limit on fines for conspiracies to violate civil rights. Additionally, 18 U.S.C. § 242 (1982) imposes a $1,000 maximum on fines for deprivation of civil rights under color of state law. Although neither of these statutes provides for payment of the fine to the victim, 18 U.S.C. § 3614 (1982) allows the court in its discretion to direct that the fine of $1,000 for seafaring seduction be paid to the mother for the benefit of the child. Why Congress was more solicitous of the needs of unwed mothers seduced at sea than the victims of civil rights violations on dry land is not recorded in the legislative annals.

177. 365 U.S. at 167 (1961).

breathed life into the Section 1983 action. Society clearly needs fearless judges and prosecutors, but it also wants courageous governors, chiefs of police, and other officials in our state and local governments. Other than the historic common law basis for the absolute immunity defense, little rationale supports it as a basis for denying liability. Congress should amend Section 1983 to provide the same level of immunity for all state and local officials in terms of potential personal liability in civil damages.

Third, governmental entity liability under Section 1983 should be expanded to include liability under the doctrine of respondeat superior. At present, there is a clear conflict of interest between public administrators charged with defending the municipal interest in a Section 1983 case and public employees who also have been sued in their individual capacities in the same litigation. If the city can convince the court that the violation took place as the result of an individual's actions and not as a matter of official policy, the city escapes liability for compensatory damages and shifts it to the employee. Conversely, the employee's qualified good faith immunity defense is significantly strengthened if he or she can demonstrate that the action taken was in conformity with or pursuant to an official policy of the governmental entity. When the municipality undertakes to defend its employees in civil rights litigation, there will be dangerous cross-pressures which will influence the defense attorneys. Even if separate defense counsel are employed, the situation is bound to undermine employee morale when it appears that the municipal employer cannot be counted upon to support its employees' use of the qualified good faith defense in suits arising out of their duties. To avoid the current twin perils of leaving the victim uncompensated and pitting the employee against the municipal employer, Section 1983 should be amended to provide for governmental entity liability for most constitutional wrongs. This amendment should extend liability to the state level as well as to lower governmental units.

The stark choice offered by the Supreme Court's current interpretation of the law is whether the victim or the taxpayer is to bear the burden of a constitutional rights violation. The courts and legislatures must choose to compensate the victim. State tort claims acts and judicial decisions which abrogate the doctrine of sovereign immunity have increased the states' tort liability over the past few decades with no apparent destruction of state institutions. These remedies available to plaintiffs do not provide for constitutional harms, however, because

they are premised on putting the state in the position of a private employer responsible for the torts of its employers by operation of the respondeat superior doctrine. Because private employers are not faced with the possibility of constitutional wrongs, there is no private law analogy which obligates the states to pay for constitutional wrongs in their own courts, even when sovereign immunity has been swept away. Adding respondeat superior liability for constitutional torts should not significantly increase the risk of financial disaster for well-managed governmental entities, especially if the $10,000 maximum award for a constitutional rights deprivation suggested above is incorporated into the amendatory language for Section 1983.

Finally, the presumption of constitutionality should be fully incorporated into Section 1983 so that neither public officials nor governmental units are held liable for enforcing official policy which is later held to be unconstitutional. Assuming that a constitutional violation does not occur until a court of competent jurisdiction has declared that governmental action is impermissible, and that official acts are presumed to be valid until otherwise determined by a judicial body, then no rights have been violated at the time of the action in question. The Court's subsequent intervention declaring that the action will be considered unconstitutional in the future should not undermine the presumptive constitutionality of the original governmental action upon which the entity's officials reasonably relied. This approach for Section 1983 in the context of awarding money damages will not deter suits for injunctive and declaratory relief, however, as the attorneys' fees provision[178] makes it apparent that such litigation need not be excessively costly if the challenge is meritorious.

It is important to qualify the extent to which the presumption of constitutionality should be employed under Section 1983. The presumption should be permitted only in those instances in which the policy in question could fairly have been considered constitutional. Certainly there should be no refuge in the limitation of liability for governmental units which continue to employ an obviously unconstitutional policy.[179]

The line drawing which would be required to implement this suggestion is complex, but it is no more complicated than that undertaken

178. 42 U.S.C. § 1988 (1982).

179. For example, a "whites only" employment policy should not under any stretch of the imagination claim justification under this defense in light of equal protection decisions rendered during the past thirty years.

when courts attempt to make the necessary determinations under the qualified good faith immunity rules surrounding individual defendants in Section 1983 litigation. As currently employed, the court must determine whether the officer should have known that his or her conduct was violative of a clearly established constitutional right of the victim. Adherence to the suggestions outlined above does not impose an impossible burden on the courts, but simply requires them to continue the line drawing in a different setting.

An amendment to Section 1983 providing that governmental units would not be liable in damages for policies and actions which were presumptively constitutional at the time they were adopted or enforced would be a proper allocation of statutory risks and benefits for the individual and the governmental units involved. The individual is protected from all of those wrongs which are a matter of settled law; the governmental unit is protected from liability imposed retroactively by a judicial constitutional decision. Lastly, the continued possibility of injunctive and declaratory relief in conjunction with awards of attorneys' fees provides an incentive to seek an interpretation of the Constitution which expands the rights of individuals into new areas.

VI. Conclusion

While these suggestions are not the total solution to the remedial problems surrounding the vindication of federal constitutional rights, they are a step in the direction of making real the promise voiced by the Supreme Court over the past two hundred years. There is no doubt that current case law leads to the conclusion that at least some constitutional rights have been rendered "worthless" in terms of redress through an action for money damages under Section 1983. It is time to begin a serious effort to effect a more adequate federal remedy for the vindication of these priceless constitutional rights.